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Office of Administrative Law Judges
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Issue Date: 03 June 2003

CASE NUMBER: 2001-LHC-2378

OWCP NUMBER: 18-73284

In the Matter of :

JOHN VANTASSEL,
Claimant,
v.

POOL CALIFORNIA ENERGY SERVICES,
Employer,
and

SIGNAL MUTUAL INDEMNITY ASS'N,
Insurer.

Appearances

James Coalwell, Esquire
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For the Claimant

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For the Employer and Insurer

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim under the Outer Continental Shelf Lands Act extension of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as "the Longshore Act" or "the Act"). A trial on the merits of the claim commenced in Long Beach, California, on July 12, 2002, but was recessed so that the claimant could present evidence concerning an amendment to his claim alleging work-related injuries to his psyche. The trial resumed on February 19, 2003 and was concluded on February 20, 2003. During the trial, the following exhibits were admitted into evidence: Claimant's Exhibits 1-19 and Employer's Exhibits

1-24. In addition, the parties subsequently submitted the following post-trial exhibits: EX 25 (post-trial deposition of Dr. Jerome Franklin), EX 26 (post-trial deposition of Dennis Boswell), EX 27 (printout showing amount the employer paid to the State of California Employment Development Department), CX 20 (February 14, 2003 report of Dr. Allen Enelow), CX 21 (March 3, 2003 report of Dr. Kathleen Murphy), CX 22 (post-trial deposition of Dr. Enelow), CX 23 (copies of records from the employer's personnel file for the claimant), CX 24 (copies of bills incurred as litigation expenses), CX 25 (transcript of July 3, 2002 trial testimony of Craig Dean Garrett), CX 26 (post-trial deposition of Oliver D. Boyer, III), and CX 27 (post-trial deposition of Kimberlee Holliday).

BACKGROUND

The claimant, John D. Vantassel, was born on July 1, 1971. EX 16 at 215. He has not completed high school or obtained a GED. Tr. at 121. At age 17, he began working in the oil fields of Oklahoma and southern California. EX 12 at 149. In 1996, the claimant began working for Pool California Energy Services (hereinafter "Pool" or "the employer"). CX 23 at 506, EX 24 at 642, EX 16 at 225. At some point late in 1999, he began working on offshore oil rigs and thereby increased his average weekly earnings. Tr. at 90, EX 16 at 249-50. According to the claimant, his work on oil rigs required him to repeatedly engage in heavy lifting. Tr. at 84-85, EX 16 at 227-28.

When the claimant began working on offshore oil rigs, he would work 12 hours a day for seven days in a row and live on the rig, where Pool provided his room and board at no cost to him. Tr. at 85-86. After working for seven days, he testified, he would have seven days off. Tr. at 86. On days when the claimant wasn't working, he engaged in various types of martial arts, including a form of fighting called submission fighting. Tr. at 103-05. On some occasions, he testified, he would grapple with other students of the martial arts while he was blindfolded. Tr. at 104-05.

While the claimant was working as a derrickman for Pool on Platform Hildago on the outer continental shelf on April 21, 2000, he fell off a roll-away bin and landed on a hatch cover on the platform's deck. EX 1, EX 9 at 111, Tr. at 90-91. Immediately before the claimant fell, he had been standing on top of the bin and attempting to dislodge a sling. Tr. at 90, CX 1, EX 16 at 246. Estimates of the height of the bin have ranged from four to ten feet. EX 1, EX 9 at 111, EX 10 at 134, EX 13 at 163, Tr. at 90-91. According to the claimant, when he landed his lower back struck the hatch cover and he felt that his "whole body was hurting." Tr. at 92. Later that day, the claimant was taken by helicopter to a medical clinic in Santa Maria, California. CX 23 at 482, Tr. at 93, EX 13 at 165, CX 6.

On April 24, 2000, the claimant was examined in Bakersfield, California, by Dr. Larry M. Cho. EX 9 at 111. When Dr. Cho examined the claimant, he found extreme tenderness to palpation of his lumbosacral spine, anterior flexion to 40 degrees and extension to 10 degrees. Straight leg raising tests were positive at 60 degrees on the right and 90 degrees on the left. Dr. Cho interpreted x-rays of the claimant's spine as being "negative" and diagnosed the claimant's injury as a lumbosacral spine "strain/contusion" and "thoracic spine strain." Dr. Cho further concluded that the claimant should do "no regular work" for 14 to 24 days.

On May 1, 2000, the claimant was again examined by Dr. Cho. EX 9 at 114. The claimant reported that he had "marked pain" in his thoracic and lumbosacral spine that radiated into his hips. Dr. Cho's examination reveal limited flexion and extension of the claimant's back and a spasm in the claimant's lumbosacral spine. A straight leg raising test was negative. Dr. Cho gave the claimant a prescription for two weeks of physical therapy and some pain medication. Dr. Cho authorizes the claimant to return to work, but limited his work activities to sedentary work that did not require continuous walking or standing.

On May 9, 2000, the claimant was again examined by Dr. Cho. EX 9 at 116. According to Dr. Cho's report, the claimant reported that he was 50 to 60 percent better, had been able to perform modified work duties without any problem, and had been "greatly" helped by his physical therapy. Dr. Cho noted that the claimant was walking erectly and was able to ascend and descend from the exam table without any problem. Dr. Cho's examination indicated that the claimant had no tenderness in his thoracic spine and that there was no longer a spasm in the claimant's lumbosacral spine. He also determined that the claimant had 60-70 degrees of flexion while standing and that there were negative results on bilateral straight leg raising tests. Dr. Cho concluded that the claimant should continue with his physical therapy and sedentary work activities.

On May 16, 2000, Dr. Cho again examined the claimant. EX 9 at 118. Dr. Cho's report indicates that the claimant said that he had good days and bad days, but that his condition was "65 percent" improved. When Dr. Cho examined the claimant, he found a full range of motion, no spasm, and negative results on a straight leg raising test. Dr. Cho extended the claimant's prescription for physical therapy and his restriction against non-sedentary work activities. On May 23 and 30, 2000, Dr. Cho again examined the claimant and again found negative results on straight leg raising tests. EX 9 at 121, 126.

According to the claimant's trial testimony, after he received Dr. Cho's release authorizing him to perform sedentary work he went to Pool seeking work, but was told that no such work was available. Tr. at 363, EX 16 at 302. This testimony was later disputed by Dennis Boswell, the operations manager for offshore operations of Pool Well Service. EX 26. According to Mr. Boswell's post-trial deposition testimony, sometime between May 23 and 30, 2000 he spoke to the claimant and made arrangements for the claimant to be given work duties within Dr. Cho's limitations in Pool's office on Rosedale Highway in Bakersfield, California, beginning on May 31, 2000. EX 26 at 8-9, 33-34, 62. However, he testified, the claimant failed to appear or provide any explanation for his failure to appear and he therefore concluded that the claimant was not interested in working for Pool. EX 26 at 9, 11. Mr. Boswell also indicated that he had called the claimant's home on May 31, 2000 in order to find out why the claimant had failed to appear for work but talked only to the claimant's wife because the claimant was reportedly at a baseball field. EX 26 at 9, 23. According to Pool records, efforts to find light duty employment for the claimant were abandoned after May 31, 2000 because Dr. Cho had limited the claimant to sedentary work. CX 23 at 466.

When Dr. Cho saw the claimant on June 7, 2000, the claimant reported that he no longer had any problem in his thoracic spine, but was continuing to have pain in his lumbosacral spine and had a tingling sensation in his buttocks. EX 9 at 129. After performing a physical examination that

included negative results on a straight leg raising test, Dr. Cho described the claimant's condition as consisting of a lumbosacral strain, but noted that there was "little objective evidence to substantiate" the claimant's complaints of pain and tingling.

On June 13, 2000, the claimant underwent a MRI scan of his lumbosacral spine. EX 11. According to the radiology report, the MRI scan showed a "small central and right-sided disc protrusion at L4-5 which causes mild canal stenosis and right-sided foraminal stenosis"and mild bulging discs at L2-3 and L3-4 that caused mild canal stenosis.

The claimant was last examined by Dr. Cho on June 15, 2000. EX 9 at 131. At that time, Dr. Cho's examination found that there was no paradorsal or paralumbar tenderness and that the results of bilateral straight leg raising tests were negative. Dr. Cho decided to refer the claimant to an orthopedic surgeon for consultation and continued to restrict the claimant to sedentary work.

As requested by Dr. Cho, on June 27, 2000, the claimant was examined by Dr. Michael Tivnon, a board-certified orthopedic surgeon. EX 10 at 134-36. When Dr. Tivnon examined the claimant, he found that the claimant's range of back motion was only 75 percent of normal and that there were positive results on a straight leg raising test. Based on these results and the results of the MRI of the claimant's lumbar spine, Dr. Tivnon diagnosed the claimant's work injury as "sciatica with disc herniation." Dr. Tivnon recommended that the claimant be given three epidural injections and anticipated that the claimant would be temporarily disabled for two to three months. He also suggested that the claimant would have permanent restrictions.

On July 14, 2000, the claimant had the first of the epidrual injections recommended by Dr. Tivon. EX 10 at 137-38. The second injection occurred on August 4, 2000. EX 10 at 139-40. On August 8, 2000, Dr. Tivnon reported that the claimant was feeling better, but would be temporarily disabled for another three months. EX 10 at 143.

On August 8, 2000, Dennis Boswell sent the claimant a letter informing him that Pool has a policy of terminating any employee who, for any reason, does not work for 90 days. CX 10 at 153. EX 26 at exhibit 1. The letter also informed the claimant that if he could get a medical release authorizing him to return to full duty within the next seven days, he would be put back to work, but that if he could not get such a release his employment would be terminated on August 15, 2000.

On September 26, 2000, Dr. James R. Friend issued a report on Dr. Tivnon's stationery which indicated that, because of the claimant's "desire to talk about how sick he is, it was "very difficult" to ascertain what benefit he had received from the epidural injections. EX 10 at 144. Dr. Friend added that it would be extremely important to determine the benefit from the epidural injections before performing any type of surgery and pointed out that at that time there was "no objective evidence" that surgery would change the claimant's condition.

On October 2, 2000, an attorney for Pool sent the claimant's counsel a letter in which she represented that Pool has a leave of absence policy that calls for the termination of any employee after 90 days of absence from work, regardless of the reason for the absence. EX 26 at exhibit 2.

However, she indicated that because the claimant had not been notified of the policy until August 8, 2000, he would not be terminated if he returned to work by November 7, 2000.

On November 1, 2000, Dr. Tivnon issued a report in which he indicated that the claimant was still having "significant back, buttock and leg pain" and should remain off work. EX 10 at 145, 147. On November 29, 2000, Dr. Tivnon reported that because of the claimant's continuing complaints of radicular symptoms, he was being referred to an another physician for a neurological consultation. EX 10 at 145.

On November 2, 2000, the claimant was deposed by the counsel for the employer. EX 16 at 209-331. The claimant testified that he was then married to Sahah Denise Vantassel and that she was with him at the deposition. EX 16 at 212-13. As well, he denied any participation in "martial arts," including teaching martial arts, since the April 21, 2000 injury. EX 16 at 233-34, 236-38, 240, 245. The claimant also claimed that he was still experiencing pain in his low back that radiated into his buttocks and legs and that the back pain was almost as severe as it had been on the day of his work injury. EX 16 at 254-55, 258, 262. In addition, the testified that he did not drink alcohol because about four or five months earlier his wife had threatened to leave him if he didn't stop drinking. EX 16 at 259. The claimant later reviewed the deposition transcript and made corrections. EX 16 at 279-80.

On December 7, 2000, the claimant was examined at the employer's request by Dr. Geoffrey M. Miller, a board certified orthopedic surgeon. EX 12 at 149-56. During the examination, the claimant reported that he had continuous lumbar pain that varied in intensity and left leg "symptoms" that were usually in the leg's posterior and sometimes involved the whole leg. He also reported occasional right leg symptoms. Dr. Miller reported that when he examined the claimant, he found a spasm from L4 to the sacrum on the left side of the claimant's lumbar spine but that the results of straight leg raising tests were "essentially negative." Dr. Miller summarized the records of the claimant's prior treatment and noted that the claimant's symptoms appeared to alternative between thoracic complaints and lumbar complaints. As well, Dr. Miller described the results of the MRI scan of the claimant's lumbar spine as showing only a "very small protrusion" that was on the opposite side of the claimant's complaints and "not clinically significant." He also noted inconsistencies in the claimant's description of his symptoms over time and inconsistencies between the reported symptoms and the results of medical tests. In concluding his report, Dr. Miller opined that there were "no real objective findings" to corroborate the claimant's description of his symptoms, but concluded that the claimant's description of his symptoms would warrant a prophylactic work preclusion against "heavy lifting." Dr. Miller also concluded that future medical care would not be necessary.

On December 11, 2000, the claimant was examined by Dr. John M. Larsen, a board-certified orthopedic surgeon. CX 8 at 96-106. The claimant reported to Dr. Larsen that he had pain in his lower back that increased if he engaged in walking, standing, sitting, or laying down, and that he also had pain that radiated into his left leg and occasionally into his right leg. Dr. Larsen's examination identified a spasm in the claimant's back and produced positive results on a straight leg raising test of the claimant's left leg. As well, the examination also found a decrease in sensation in left L4, L5 and S1 dermotones of the claimant's left leg. Dr. Larsen concluded that the claimant was totally

temporarily disabled and that his condition had not yet reached the point of maximum medical improvement.

On January 4, 2001, the claimant was examined by Dr. Roy H. Simon, a board certified anesthesiologist. CX 9 at 131-34. His examination produced positive results on a left side straight leg raising test, and positive results on a Lasegue's test. The next day Dr. Simon performed a lumbar mylogram and neurograms on the left side of several levels of the claimant's lumbar spine. EX 17 at 332-34. According to Dr. Simon's report, the neurograms at L4, L5 and S1 were all normal and the mylogram indicated only that the claimant had "very mild" central canal stenosis at L4-5. EX 17 at 334. At the same time, Dr. Simon also gave the claimant an epidural steroid injection. EX 16 at 332.

The claimant was deposed for a second time on January 15, 2001. EX 16 at 276-331. According to his testimony, his first epidural injection didn't help his back, but the third injection did relieve his leg symptoms a little bit and his most recent epidural injection had also helped some. EX 16 at 284-85, 289, 316. He further testified that he had not been attending physical therapy sessions because his prior physical therapy didn't help him and because he didn't have access to a car. EX 16 at 295. He also acknowledged that he seldom used TENS unit prescribed for him by Dr. Larsen. EX 16 at 298. As in his prior deposition testimony, the claimant again asserted that he hadn't taught any karate, ultimate fighting, or ju Jitsu to anyone since the date of his work injury. EX 16 at 322. In addition, he testified that his wife was monitoring his medical appointments for him. EX 16 at 290. The claimant later submitted corrections to the transcript. EX 16 at 331.

Sometime in late January of 2001, the claimant's wife, Sarah Vantassel, left the claimant and went with her children to live with her mother.[1] CX 15 at 244-247, 253, EX 23. According to Ms. Vantassel's deposition testimony, after the claimant's work injury, his "personality and stuff changed" and "we didn't get through it." CX 15 at 244, 253-54. When asked in what ways the claimant had changed, she testified that some months after his injury there was a "change of friends" and he was "not coming home." CX 15 at 267-68. In addition, she testified, she had reason to believe he was smoking marijuana. CX 15 at 268-69. She further indicated that after she sought a legal separation from the claimant she obtained a restraining order against him because she was afraid of him. CX 15 at 246. She also testified that she had been living with the claimant at the time of his work injury and in August of 2000 had gone with him to see the claimant's attorney because she was concerned about a letter indicating that the claimant was being terminated from employment at Pool and would lose his medical insurance. CX 15 at 248, 253. According to Mrs. Vantassel, the claimant could no longer participate in martial arts after his work injury, but did visit a martial arts school "a couple of times." CX 15 at 251. However, she said she did not accompany him and doesn't know what he did on those occasions. CX 15 at 251. She also recounted that the claimant stopped doing

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1. During deposition testimony, Ms. Vantassel acknowledged that her divorce complaint alleged that she had been separated from the claimant since January 28, 2000, but said that this date was an error and that it was probably in January of 2001 when she left the claimant. CX 15 at 244-45, 247, 253.

yard work after his injury and "seemed to be more depressed" after a doctor told him he could no longer work in the oil fields. CX 15 at 252-53, 261-62, 274. In addition, she indicated that the claimant had once gone to Pool's Rosedale Highway office to perform some "light" duty work but came home and said that he was told that there was no such work available. CX 15 at 255-56.

On February 16, 2001, Dr. Simon performed additional neurograms at levels L4-5 and S1 of the claimant's lumbar spine. EX 17 at 336-38. The results of these tests indicated normal results at L5, "mild central canal stenosis" at L4-5, and "mild stenosis over the dorsal root ganglion" on the right side of S1. EX 17 at 338.

On February 23, 2001, the claimant was again examined by Dr. Larsen. CX 8 at 107-09. Dr. Larsen found tenderness in the claimant's back and a limited range of back motion, but that there were negative results on bilateral straight leg raising tests. He recommended that the claimant undergo five weeks of physical therapy.

On February 26, 2001, the claimant was examined for a second time by Dr. Miller. EX 12 at 157-62. According to Dr.Miller's report, the claimant had received another epidural injection only 10 days before the examination and since then his left leg symptoms had "markedly improved." However, the claimant also told Dr. Miller that he still had "rather consistent pain" in his right thigh and continuous low back symptoms that were aggravated by most activities. According to Dr. Miller, the results of a straight leg raising test were "really essentially negative" and the results of his examination of the claimant's lumbar spine were "quite similar" to the results of the prior exam. However, Dr. Miller also noted that the "lumbar region does not show any palpable spasm." Dr. Miller also commented that Dr. Larsen's report of December 15, 2000 erred in concluding that there were three nerve roots involved in the claimant's symptoms and noted that a "selective nerve root study" had shown that there was no foraminal entrapment. In concluding his report, Dr. Miller opined: (1) that the study recommended by Dr. Larsen showed that the claimant had "an essentially normal lumbar spine," (2) that the claimant's condition became permanent and stationary on January 5, 2001, (3) that the restriction he recommended in his last report was only against "heavy lifting," not "heavy work," (4) that the restriction was only prophylactic and "not a direct consequence" of the claimant's work related injury, and (5) that the claimant had made a "good faith" effort during his examination.

During the trial, Dr. Miller testified that when he examined the claimant in December of 2000 and February of 2001, the claimant had denied engaging in any sort of athletic activities since his work injury and had not mentioned that he had been involved in any sort of martial arts. Tr. at 498-99, 517-18, 556. Dr. Miller further testified that if he had known that the claimant had been engaging in martial arts after his April 21, 2000 work injury he would have concluded that the claimant did not have any work restrictions. Tr. at 513-15, 519, 530, 553-55. Dr. Miller also asserted that it would be an error to interpret his first report and indicating that his examination of the claimant's back detected a muscle spasm. Tr. at 534-35. Rather, he testified, the claimant complained of a spasm, but none could be found when he examined the claimant's back. Tr. at 535.

On March 29, 2001, the claimant was examined at the employer's request by Dr. Ronald D. Farran, a board certified neurologist. EX 13 at 163-73. During the examination, the claimant told

Dr. Farran that he had persistent low back pain and "shooting pain" that went into his left leg. Because of these symptoms, the report indicated, the claimant is no longer able to engage in Brazilian Jujitsu or kick boxing. When Dr. Farran examined the claimant's low back, he found that the claimant's muscles were "palpably tight" but that the claimant had a full range of motion. Dr. Farran also reported that EMG tests of the claimant's legs and back were within normal limits and that the results of nerve conduction time studies were also normal. In concluding his report, Dr. Farran noted that the results of his neurological examination of the claimant, which had included straight leg raising tests, were "entirely normal." He therefore opined that this evidence and the results of the claimant's lumbar MRI indicated that the claimant's reports of his symptoms "far outweigh any objective findings." Dr. Farran also opined that the claimant could return to his former occupation and perform his usual and customary duties.

On April 6, 2001, the claimant was again examined by Dr. Larsen. CX8 at 110. Dr. Larsen found that there were no spasms in the claimant's back, but that he had a limited range of back motion. He recommended that the claimant undergo a discogram.

On May 8, 2001, the employer sent the claimant a Notice of Controversion of Compensation which indicated that the payment of Longshore Act benefits was being terminated based on the medical reports of Dr. Miller and Dr. Farran. CX 4 at 37-38.

On July 19, 2001, the claimant was re-examined by Dr. Larsen. CX 8 at 112-18. Dr. Larsen's examination detected a spasm in the claimant's back and a limited range of back motion. Dr. Larsen also summarized the records of the claimant's recent tests and medical examinations and concluded that the claimant was still totally temporarily disabled. Dr. Larsen disagreed with the conclusions of both Dr. Miller and Dr. Farran and, in particular, with their determinations that the claimant's condition is permanent and stationary. Dr. Larsen also reiterated his opinion that the claimant should be given a discogram.

On August 23, 2001, the claimant's counsel and the employer's counsel appeared before State of California Administrative Law Judge Oliver D. Boyer, III, concerning the claimant's application for benefits under the workers' compensation laws of the State of California. CX 26 at 31-32. During the proceeding there was a discussion concerning the selection of an "agreed medical examiner." CX 26 at 31-32. According to the post-trial deposition testimony of Judge Boyer, the claimant's counsel contended that the agreed examiner's report should apply to both the claimant's federal and state claims, while the employer's counsel contended that the examination should apply only to the state claim. CX 26 at 31-32. Judge Boyer also testified that his response to the dispute was to inform the parties that it was up to the judge presiding over the federal claim to decide how much weight to give the examiner's report. CX 26 at 31-32. On August 24, 2001, the counsel for the employer sent a letter to the claimant's counsel to memorialize a telephone conversation of that date in which the two counsel discussed having the claimant examined by Dr. Thomas J. Pojunas "in connection with" the claimant's "State of California workers' compensation case." CX 2 at 13. On August 28, 2001, the claimant's counsel sent a response in which he referred to a lengthy discussion before Judge Boyer and asserted that the examination to be performed by Dr. Pojunas would relate "to both the WCAB and Department of Labor cases." CX 2 at 17.

On August 30, 2001, the claimant was again examined by Dr. Larsen. CX 8at 119-21. Dr. Larsen's examination indicated that the claimant still had a limited range of back motion and that he had a "mild muscle spasm" in his back. Bilateral straight leg raising tests were negative and Dr. Larsen concluded that the claimant was still totally temporarily disabled.

On September 4, 2001, the claimant was examined by Dr. Pojunas, a board certified orthopedic surgeon. EX 14 at 175-82. During the examination, the claimant told Dr. Pojunas that he has a "constant ache" in his low back and that the ache increased if he engaged in lifting, bending, or prolonged walking or sitting. The examination revealed that the claimant had no swelling or spasm in his lumbar spine, but did have a decreased range of lumbosacral motion. The claimant reported pain when given bilateral straight leg raising tests, but the results of the sitting and supine tests were substantially different when the right leg was tested. Dr. Pojunas also reviewed and summarized the results of the MRI of the claimant's lumbar spine, the neurograms performed by Dr. Simon, and the EMG testing performed by Dr. Farran. Only two conditions were listed in the "Diagnosis" section of Dr. Pojunas' report: "central and right sided disc protrusion at L4-5 with mild canal stenosis" and "minimally bulging discs at L2-3 and L3-4." In concluding his report, Dr. Pojunas opined that: (1) the claimant's condition had become permanent and stationary on February 23, 2001, (2) that the claimant was totally temporarily disabled from April 21, 2000 to February 23, 2001, (3) that the claimant should be precluded on a "prophylactic basis" from heavy lifting, repeated bending, and stooping, (4) that all of the claimant's disability is solely attributable to his work injury of April 21, 2000, (5) that the claimant is a "qualified injured worker," i.e, unable to return to his prior job, and (6) that the claimant does not need any surgery or further physical therapy, but additional epidural steroid injections might be warranted.

On November 14, 2001, Dr. Pojunas completed a work restriction evaluation form. EX 14 at 183-85. In the form, he indicated that the claimant is capable of performing most work-related activities, but should not lift more than 20 to 50 pounds or engage in more than intermittent lifting or bending for more than four hours a day.

On December 6, 2001, vocational consultant Paul D. Johnson completed a labor market survey that identified 13 specific jobs that Mr. Johnson believes are within the restrictions set forth by Dr. Pojunas and suitable for a person with the claimant's vocational background. EX 15 at 188-200.

On December 14, 2001, the claimant attended an initial evaluation meeting with Kimberlee Holliday, a vocational consultant who had been designated by the State of California's Workers' Compensation Appeals Board (WCAB) to provide vocational rehabilitation services to the claimant. CX 27 at 6 and 54, CX 11 at 171-72. Because of the claimant's representations concerning his physical limitations during the evaluation meeting, Ms. Holliday was unsure if it would be feasible to vocationally rehabilitate the claimant. CX 27 at 16. Nonetheless, she arranged for the claimant to be given some vocational tests and the results of the tests indicated that the claimant's ability to read, spell, and perform mathematical calculations were below a third grade level. CX 27 at 19-20. Thereafter, Ms. Holliday pursued various activities designed to find new employmenfor the claimant. CX 11 at 173-205.

On January 14, 2002, the claimant was re-examined by Dr. Larsen. CX 8 at 122-26. Dr. Larsen's examination revealed that the claimant had a limited range of back motion, a "mild amount of muscle spasm" and paraspinal muscle tenderness. Dr. Larsen also summarized the September 4, 2001 report of Dr. Pojunas and indicated that he disagreed with his opinion that there is no need to perform a discogram on the claimant. Dr. Larsen also indicated that he believed the claimant's condition became permanent and stationary on September 4, 2001.

On January 18, 2002, the claimant and his attorney signed a State of California "Stipulations with Request for Award" form and thereby offered to settle the claimant's claim for benefits under the State of California workers' compensation system for a lump sum. CX 5 at 43.

On February 25, 2002, the claimant was again examined by Dr. Larsen. CX 8 at 128-30. Dr. Larsen found that the claimant had a restricted range of back motion and tenderness in his paraspinal muscles. Dr. Larsen concluded that the claimant's injury remained permanent and stationary.

On June 5, 2002, Ms. Holliday made a formal recommendation that the claimant's rehabilitation benefits be terminated. CX 11 at 205. This recommendation, which was later approved, was based on the claimant's "lack of participation and failure to maintain contact" with Ms. Holliday's office. CX 11 at 205, CX 27 at 56, 58, 82. Ms. Holliday's recommendation further noted that the claimant had been counseled in February of 2002 about his participation and had promised to fully participate in the rehabilitation program, but had then missed his next scheduled appointment and had kept only one of his next four appointments. CX 11 at 205. The recommendation also noted that the claimant had never signed the Vocational Rehabilitation Plan that Ms. Holliday had prepared for him. CX 11 at 205. In a post-trial deposition, Ms. Holliday testified that if the claimant was suffering from "serious depression" requiring medication and psychiatric counseling between December of 2001 and March of 2002, she would have given consideration to those circumstances, but that she does not know what the claimant's psychological status was at that time. CX 27 at 52-53, 75. She also testified that the claimant's participation in her vocational rehabilitation efforts fell off after he began reporting transportation problems and delays in receiving his vocational rehabilitation allowance checks. CX 27 at 72.

A pre-trial deposition of Dr. Pojunas was taken on June 28, 2002. EX 21 at 370-533. During the deposition, he testified: (1) that he saw no evidence of atrophy in the claimant's legs during his examination and the absence of such atrophy a year and a half after an injury is "significant," but does not rule out the possibility of radiculopathy, (2) that the results of the claimant's MRI scan could be consistent with nerve root compression, but are not diagnostic of compression, (3) that if the claimant had been engaging in karate sparring sessions after his work injury, it is possible that he might not be as disabled as he represented during the examination, (4) that he would have expected the claimant's back condition to have improved between April 2000 and November 2000 and would not consider claims of no improvement to be credible, (5) that pain levels of 8 or 9, six months after the claimant's injury, would not be consistent with the results of the claimant's lumbar MRI , (6) that even if the claimant engaged in grappling after his injury, his MRI scan indicates that he would still be a risk for another injury if he returned to his former job, (7) that it is difficult for him to answer questions about the claimant's condition without knowing more about

the martial arts activities in which the claimant engaged after his injury, (8) that he feels a re-examination is necessary, (9) that he performed his examination of the claimant as an "agreed medical examiner," but that his practice is limited to state workers' compensation cases, (10) that the claimant's statement that he sometimes had difficulty getting out of bed was consistent with the available medical evidence, (11) that a spasm such as Dr. Miller observed during his examination of December 7, 2000 is a finding that cannot be faked or feigned and is usually correlated with the presence of nerve root irritation, (12) that there is both objective and subjective evidence for the claimant's back difficulties, (13) that it would have been possible for Dr. Simon to have seen nerve swelling when he gave the claimant epidural injections, but his report did not report any such observation, (14) that a MRI scan showing disc abnormalities is consistent with, but not diagnostic of, nerve root swelling, (15) that a central and right side disc bulge can result in pain in either of a patient's legs, (16) that he continues to believe that the claimant should be restricted from heavy lifting, repeated bending and stooping and continue to receive medical treatment for his April 2000 injury, (17) that karate activities could have further aggravated the claimant's lumbar spine condition, (18) that the claimant's condition was either misdiagnosed by Dr. Cho or it worsened by the time the claimant was examined by Dr. Tivnon, (19) that he does not believe that there was some superseding intervening event that worsened the claimant's condition in May or June of 2000, (20) that he would have imposed restrictions against heavy lifting, repeated bending, and stooping solely on the basis of MRI results shown in the claimant's MRI scan of June 2000, (21) that he doesn't know if the claimant's participation in sparring sessions in the summer of 2000 permanently worsened the claimant's back condition, but that they could have aggravated the condition if they involved kicking and punching, (22) that it doesn't appear to him that the claimant is exaggerating his complaints, (23) that because of the inconsistencies between the reports of Dr. Cho and Dr. Tivnon, he cannot rule out the possibility that something happened to the claimant between his last visit to Dr. Cho and his first visit to Dr. Tivnon, (24) that he feels that it would be necessary for him to again examine the claimant if there's evidence that the claimant engaged in martial arts between May 31, 2000 and June 27, 2000, but otherwise, no re-examination is necessary, and (25) that if the claimant engaged in martial arts activities between May 31, 2000 and June 27, 2000 there is a possibility that those activities might have contributed to his permanent disability. EX 21 at 383, 385, 390-91, 397, 400, 401, 403-04, 410, 417-20, 422, 423, 426, 427-28, 429-30, 436, 440, 445-46, 448, 449, 451, 455, 461, 468, 469, 470, 475, 478, 480, 483, 484, 496, 502, 507, 519-20, 522, 523.

On July 3, 2002, there was a hearing before a State of California Administrative Law Judge concerning the claimant's state workers' compensation claim. Tr. at 374-78. One of the witnesses at the hearing was Craig Dean Garrett, a friend of the claimant who operates martial arts studios in Lamont and Arvin, California. CX 25 at 80-145. During his testimony, Mr. Garrett stated that he had engaged in sparring sessions with the claimant five to eight times during the months of July and August of 2000 and during those sessions the claimant threw punches and kicks at him. CX 25 at 86-88, 116. In addition, he testified that in August and September of 2000 he watched the claimant as he sparred one-on-one with three to four other "blackbelts" who were affiliated with his martial arts studio, and that during the sparring the claimant threw punches and kicks. CX 25 at 93-96. Mr. Garrett also testified that during the class sessions after the claimant's injury, the claimant seemed to have "a significant amount of pain" and had talked about the pain. CX 25 at 125, 130. Mr. Garrett also indicated that when he last saw the claimant in January of 2001, the claimant was still having

severe pain from his work injury. CX 25 at 131. Mr. Garrett further testified that neither he nor the claimant had thrown the other to the mat during their sparring sessions in July and August of 2000 and that the activities were limited to "controlled contact." CX 25 at 88, 136.

On July 12, 2002, the trial of the claimant's Longshore Act claim commenced in Long Beach, California. During the trial, the claimant testified that after his April 21, 2000 injury he did not engage in any formal martial arts competitions or in any events where he may have sparred with others while blindfolded. Tr. at 105-06, 143, 146-47, 202. He also claimed that he is no longer physically able to participate in marital arts and that he never "fought," "sparred" or "grappled" with Craig Garrett after his work injury. Tr. at 107, 126-27, 149. However, he later testified that he had in fact "grappled" with Mr. Garrett after his work injury, but asserted that it was "just to show a move." Tr. at 164, 167-70. In addition, the claimant acknowledged that he had engaged in non-competitive "grappling" with "a lot of people" after his work injury to show them moves. Tr. at 185-86. The claimant also conceded that he had visited martial arts studios after his injury and had "taught" other martial arts students by answering questions. Tr. at 106. He denied suffering any new injuries to his back after his work injury. Tr. at 108. The trial was recessed before the completion of the claimant's cross examination because the claimant's counsel represented that the claimant was psychologically unable to continue testifying. Tr. at 222-29. Thereafter, the claimant was granted permission to amend his claim to include an allegation that his work injury had resulted in a psychiatric impairment.

On August 8, 2002, the claimant was again examined by Dr. Larsen. CX12 at 206-09. Dr. Larsen's examination indicated that the claimant had paraspinal tenderness and a muscle spasm. The claimant told Dr. Larsen that he had taken a whole bottle of his pain medication and Dr. Larsen decided to refer the claimant to a psychiatrist. Dr. Larsen also recommended that the claimant be given three more epidural injections.

On August 26, 2002, Dr. Simon performed a myelogram on the claimant's lumbar spine. CX 13 at 218-20. Dr. Simon's report indicates that the myelogram showed mild interarticular stenosis at L4-5 as well as hypertrophy and mild intra-articular stenosis at L5-S1.

On November 18, 2002, licensed clinical psychologist Kathleen M. Murphy, Ph.D., issued a report concerning her visits with the claimant in August, September, October, and November of 2002. CX 14 at 222-27. In the report, Dr. Murphy indicated that the claimant had been tearful and complained that he had "lost everything," including his wife and children, home, and car. He also complained, according to the report, that unnamed insurance companies were trying to "get him for perjury" and told Dr. Murphy that he had swallowed some pills in a suicide attempt, but was saved when his girlfriend helped him to throw up. Dr. Murphy concluded that the claimant had symptoms of depression including sleep difficulties, and decreases in his appetite, concentration, and memory. Dr. Murphy's report also indicates that the claimant said that his depression began after his work injury and that the depression worsened after his wife left him, which he believed was about four to six weeks after his injury. According to Dr. Murphy's report, the claimant also told her that when he was a small child he was kidnapped by his father, who later committed suicide in the claimant's presence. Dr. Murphy's diagnosis was "major depression" and "dysthymia disorder" and she commented that it was most likely that the claimant had been depressed since childhood. She also

attributed the major depression to the claimant's work injury, which she characterized as causing "chronic pain" for the claimant. Dr. Murphy also recommended that the claimant be given psychiatric medication as soon as possible.

On December 10, 2002, the claimant was re-examined by Dr. Larsen. CX 12 at 210-13. The claimant told Dr. Larsen that he was still having some pain in his back and Dr. Larsen's examination indicated that the claimant had an "impaired" range of motion in his back. The examination also produced positive results on bilateral straight leg raising tests. Dr. Larsen concluded that the claimant's condition was still permanent and stationary.

The claimant was deposed for a third time on December 19, 2002. EX 22. During the deposition, the claimant testified: (1) that he had become legally separated from his wife, (2) that she had called the police with allegations that he was being physically violent both before and after the separation, (3) that his father hung himself while the claimant was a child, (4) that his stepfather used to beat him, (5) that the separation from his wife is contributing to his depression, (6) that he and his wife had been married and divorced once before, (7) that he is able to see his children every other weekend, (8) that he had been in numerous fights, stabbed seven times, and shot once by a gun, (8) that after his injury, his wife had to get a job and later stopped coming home on weekends, (9) that sometime after his work injury he tried to hurt himself by swallowing some pills because all his problems were "too much" to handle, (10) that he told Dr. Murphy that he suspects that his wife was going out to bars before his April 2000 injury, (11) that he was recently involved in a fistfight with his cousin and the police took him to jail, (12) that he has never hit his wife, (13) that she moved out of their home within a couple of months after he was injured. EX 22 at 547, 548-49, 556, 558, 656-67, 561, 562, 563, 567, 588, 569, 573, 583, 591-92, 596, 599-600.

On December 20, 2002, the claimant was examined at his attorney's request by Dr. Allen J. Enelow, a board certified psychiatrist. CX 19 at 333-345. In a report issued on January 31, 2003, Dr. Enelow indicated that the claimant cried frequently during the examination and "looked very depressed." Dr. Enelow's report further suggested that the claimant was attributing the break up of his marriage to his wife's financial concerns after his injury. After setting forth a summary of some of the claimant's medical records, Dr. Enelow diagnosed the claimant's condition as a "major depressive disorder–single episode." In addition, Dr. Enelow attributed the disorder to the "pain and inactivity" following the claimant's work-related injury of April 2000 and concluded that the claimant was totally temporarily disabled by his psychiatric disorder. Dr. Enelow also recommended that the claimant continue receiving counseling from Dr. Murphy and be given prescriptions for antidepressant medications.

During a post-trial deposition, Dr. Enelow testified that he found the claimant to be "completely believable" and that he does not believe that the claimant suffered from depression prior to his work-related injury. CX 22 at 359, 360, 374. Dr. Enelow further opined that the claimant's depression began when he realized that he would be unable to return to work as a derrickman and that the claimant had been totally temporarily disabled since then. CX 22 at 368, 371-72, 373. Although Dr. Enelow acknowledged that the claimant's break up with his wife was a factor in his depression, he opined that the predominant cause of the claimant's depression was his work injury.

CX 22 at 382, 393, 409. Dr. Enelow also indicated that the claimant had told him that his wife had left him because he was injured and wasn't making as much money, but acknowledged that the claimant also said that his wife had left because she was seeing someone else. CX 22 at 366, 406. Dr. Enelow also admitted that he could not say what the claimant's condition was "on and off" from the date of his work injury and that all he could firmly say was that the claimant was not even fit to participate in vocational rehabilitation on the day he examined the claimant. CX 22 at 371-72. Dr. Enelow also acknowledged that the claimant had referred to Mr. Garrett's trial testimony as mistaken, but had also said something about "perjury." CX 22 at 388. Dr. Enelow also indicated that the claimant had said that he had not used any street drugs for "years." CX 22 at 390.

On January 8, 2003, the claimant was examined at the employer's request by Dr. Jerome H. Franklin, a board-certified psychiatrist. EX 24. In his report of the examination, Dr. Franklin noted that the claimant showed no discomfort or pain behavior at all during the two and a half hour examination and also appeared to be well groomed and in excellent physical condition. EX 24 at 635-36. The report also indicated that the claimant explained that he was not working as a Brazilian Jiu Jitsu instructor because his attorneys wouldn't let him. EX 24 at 637. It further indicates that the claimant said he cried "a lot," sometimes doesn't "want to be here," and had once taken an overdose of pills because he had lost "everything," including his wife, his kids, his home, and his job. EX 24 at 638. Nonetheless, the claimant later denied being suicidal. EX 24 at 642. The claimant also told Dr. Franklin that his wife had left him two or three months after his work injury and had later served him with a divorce petition. EX 24 at 639. According to Dr. Franklin's report, the claimant recounted that, as a child, he had been kidnapped by his father, been present when his father committed suicide, and was later beaten by his stepfather. EX 24 at 653. The report also notes that the claimant had been previously married and divorced from his wife and had re-married her five or six months prior to his work injury. EX 24 at 646. For some time after the claimant's wife left, the report indicates, the claimant lived in his vehicle, but later began living with a girlfriend and performing household chores for her. EX 24 at 639-40. The claimant also told Dr. Franklin that he had recently spent four days in jail because he had been involved in a fight with his cousin. EX 24 at 642. In concluding his report, Dr. Franklin opined that it is likely that the claimant has been depressed "his entire life" and that "at most" the claimant's work-related injury might have aggravated that pre-existing condition. EX 24 at 656. However, he added, such an aggravation is "somewhat questionable" because there were so many other stressors, including his pending divorce, that could have affected the claimant. EX 24 at 656. Dr. Franklin further concluded that on a psychiatric basis the claimant's condition is permanent and stationary and that he has mental impairments that would preclude him from performing various work-related tasks at more than a "minimal" level. EX 24 at 655. It was also concluded that psychiatric treatment "might be helpful" to the claimant, but that psychotherapy would not. Dr. Franklin also opined that it is "almost impossible" to state that the need for treatment is industrially related. EX 24 at 657-58.

During a post-trial deposition, Dr. Franklin testified that it was unquestionable that the claimant's pending divorce was "very disturbing" to him and that he was "extremely emotional" and "inconsolable" whenever the subject was discussed . EX 25 at 23, 28, 35. He further testified that if the record in this proceeding showed that the insurer had paid the claimant $46,000 in benefits, that evidence would be inconsistent with the claimant's representation to during Dr. Franklin's

examination that the insurer had not paid him anything. EX 25 at 24. Dr. Franklin opined that he doesn't think that the claimant's psychiatric disability is industrially related and that, instead, any such disability is attributable to his prior history and the loss of his wife. EX 25 at 42, 50. In explaining this opinion Dr. Franklin noted that during his examination of the claimant, he talked constantly and emotionally about the loss of his wife, but did not talk "at any great length" about his accident or back condition. EX 25 at 57. In addition, Dr. Franklin opined that the claimant's psychiatric impairment would not preclude him from performing his former job as a derrickman. EX 25 at 43. Dr. Franklin disagreed with Dr. Enelow's conclusion that the claimant's psychiatric condition should be diagnosed as a "major depressive disorder." In this regard, he noted that Dr. Enelow's diagnosis is based on the mistaken belief that the claimant has fatigue, a diminished interest in almost all activities, and a significant loss of weight. EX 25 at 44-48. In addition, Dr. Franklin described Dr. Enelow's assertion that there was no evidence of any non-industrial contribution to the claimant's depression as being "absurd." EX 25 at 48. Dr. Franklin acknowledged that he has no idea about any changes in the level of the claimant's depression between the date of his work injury and the day his wife left. EX 25 at 64. Dr. Franklin said he did not have any knowledge of the claimant receiving a letter terminating his employment and medical benefits and speculated that the claimant's wife left him because he was "never home." EX 25 at 67, 69, 84.

The final trial sessions of the claimant's Longshore Act claim were held on February 19 and 20, 2003. The witnesses included the claimant, the claimant's girlfriend, Deana Bilyeu, and Craig Dean Garrett.

According to the claimant's testimony, after his work injury, he lost his home, his wife, and his kids and became suicidal in a matter of seven months. Tr. at 268-69. He asserted that his wife said that she left him because he was "doing drugs," but that he suspects that she "made up excuses" to leave him because he didn't have any money. Tr. at 270, 272, 296-97. He also asserted that he didn't mention any psychiatric problem during his first two depositions because his wife was still living with him then and he didn't know his "world was falling apart." Tr. at 296. He further testified that his depression began after his injury because he couldn't find things to do, but that he believes that it was caused by a combination of things that began with his work injury. Tr. at 311-14, 317. However, he conceded that he didn't mention his depression to Dr. Cho or Dr. Tivnon and admitted that his depression worsened after his wife left him. Tr. at 318, 320-21. According to the claimant, after the state workers' compensation hearing that occurred on July 3, 2002, he was so depressed that he stole his girl friend's car and sat in the car crying for two days. Tr. at 362. As well, he testified, after the July 12, 2002 Longshore Act trial, he took an overdose of pills because he didn't want to live any more. Tr. at 363. The claimant also denied telling people that he expected to get $1 million to $1.5 million for his workers' compensation claim. Tr. at 331.

According to the testimony of the claimant's girlfriend, Deana Bilyeu, she started dating the claimant around the end of March of 2002 and later allowed him to move into her home because he did not have anywhere else to live. Tr. at 380. After he began living in her home, she testified, he cried a lot about his family, his job, and his karate, but then said the crying was "always a lot about Sarah, or the kids, ... or what he used to do before." Tr. at 381-82. She confirmed that he had taken an overdose of medication and had disappeared with her car for two days after the state workers'

compensation hearing where Mr. Garrett first testified. Tr. at 374-78. However, she disputed the idea that the claimant was upset because Mr. Garrett's testimony contradicted the claimant's description of his post-injury activities and said it was "just probably one thing" that contributed to the claimant's state of mind. Tr. at 391-92. She also testified that the claimant has "a lot of different personalities" and cries excessively. Tr. at 378-79. She doesn't believe that the claimant is emotionally capable of working, but that he would be better off working. Tr. at 387.

According to the trial testimony of Mr. Garrett, he personally engaged in "sparring" with the claimant on "several" occasions. Tr. at 403-08, 433. During the sparrings, Mr. Garrett testified, the claimant and he kicked and threw punches at each other in what he described as a "friendly exchange." Tr. at 408. These sparring sessions, Mr. Garrett recalled, lasted from two to five minutes. Tr. at 419. As well, he testified, some time after April 21, 2000, he also saw the claimant sparring with some "black belts" and also saw the claimant "grappling" with some students while he was blindfolded. Tr. at 413-18, 419, 439. Mr. Garrett also testified that the claimant had worked at his school as a non-paid instructor in grappling after April 21, 2000 and that the claimant had told him that he had sparred with students at another martial arts school after April 21, 2000. Tr. at 417-19, 430. However, Mr. Garrett acknowledged that around September of 2000 the claimant began tapering off in his martial arts activities and by the end of October of 2000 had stopped participating in martial arts. Tr. at 434, 438. He also acknowledged that at his school physical exchanges were done in a teaching capacity and there was never any "full out" fighting in his classes. Tr. at 440. According to Mr. Garrett, the claimant also told him that he had been told that he could receive $1 million to $1.5 million for his work injury and intended to use the money to open a martial arts studio. Tr. at 428. Mr. Garrett also recalled that there were times after the claimant separated from his wife when he would "just break down and cry." Tr. at 437.

On April 14, 2003, the parties took the post-trial deposition of Dennis Boswell, the operations manager for offshore operations of Pool Well Service, Inc. EX 26. Mr. Boswell testified that during a period after the termination of the claimant's employment, he was willing to re-hire the claimant as an offshore oil platform worker if the claimant were able to obtain a medical release authorizing him to return to such work and even now would consider an application for the claimant's re-employment if the claimant has a medical release. EX 26 at 12-15, 22, 53, 55. Mr. Boswell also recalled receiving a telephone call from the claimant's wife concerning the August 8, 2000 letter informing the claimant of his termination and that she expressed concern about the loss of medical coverage that would result from the termination of the claimant's employment. EX 26 at 25. He also testified that even though the August 8, 2000 letter to the claimant specified that he would need a medical release authorizing him to return to full duty, the claimant could have been re-employed if he had been able to obtain a release authorizing light duty work. EX 26 at 27. Mr. Boswell also testified that the claimant was not actually terminated until November 7, 2000 and that he has no knowledge that the claimant ever went to his company's Rosedale Highway facility asking for light duty work. EX 26 at 28, 32. He also testified that, although Pool's prior owner had a policy of not terminating employees for 180 days, the current owner has a policy of terminating employees who have not worked for 90 days and that the policy applies regardless of the reason for an employee's work absence and has been consistently applied. EX 26 at 32-33.

ANALYSIS

The parties have stipulated: (1) that the claimant sustained an injury arising out of and in the course of his employment on April 21, 2000, (2) that the injury occurred at a situs under the jurisdiction of the Outer Continental Shelf Lands Act, and (3) that the food provided to the claimant while working on offshore oil platforms was worth $25.00 per day.

There are disputes between the parties concerning the following issues: (1) the claimant's average weekly wage at the time of his injury, (2) the date of maximum medical improvement for the claimant's physical injuries, (3) the extent of any physical disabilities resulting from the claimant's injury, (4) the timeliness of the notice of the alleged psychiatric injuries under section 12 of the Act, (5) the timeliness of the claim for psychiatric injuries under section 13 of the Act, (6) whether the claimant suffered any psychiatric injury as a result of his April 21, 2000 injury, (7) the date of maximum medical improvement for the claimant's alleged psychiatric injuries, (8) the extent of any psychiatric disabilities resulting from the April 21, 2000 injury, (9) the extent of the claimant's entitlement to disability benefits, (10) whether the employer terminated the claimant's employment in violation of section 48a of the Act, (11) the employer's entitlement to a credit under subsection 3(e) of the Longshore Act for vocational rehabilitation payments it made to the claimant under the State of California's workers' compensation system, (12) the employer's entitlement to a credit under subsection 3(e) of the Longshore Act for amounts that the employer paid to reimburse the State of California for State Disability Insurance payments the state had made to the claimant, and (13), the employer's liability for the claimant's self-procured medical treatment from Dr. Murphy.

1. Average Weekly Wage

Under Section 10 of the Act, there are three alternative methods for determining the appropriate average weekly wage of an injured worker. These methods are set forth in subsections 10(a), 10(b), and 10(c). Subsection 10(a) applies when an injured worker worked in the same employment for "substantially the whole of the year" immediately preceding his or her injury. Subsection 10(b) applies when the injured worker was not employed substantially the whole of the year preceding the injury, but there is evidence in the record of wages of similarly situated employees who did work substantially the whole of the year. When neither subsection 10(a) or 10(b) can "reasonably and fairly be applied," subsection 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). In some cases, the courts have held, subsection 10(c) requires that consideration be given to wages that a worker could have earned after the date of his or her injury. For example, in *Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 757 (7th Cir. 1979), the Seventh Circuit held that it was proper to consider the potential future earnings of injured workers when the evidence showed that the workers were employed at a new port where the volume of work had increased substantially each successive year. 596 F.2d at 753, 757-59. Likewise, in *Palacios v. Campbell Industries*, 633 F.2d 840, 843 (9th Cir. 1980), the Ninth Circuit held that where an injured worker had begun working as a painter shortly before his work-related injury, an administrative law judge was required to reflect in the claimant's average weekly wage calculation such amounts as the claimant might have earned following his injury in his new occupation as a painter. Similarly, in *National Steel and Shipbuilding*

Co. v. Bonner, 600 F.2d 1288 (9th Cir. 1979), the same court held that it was proper for an administrative law judge to base a claimant's average weekly wage on a claimant's potential earnings as a pipefitter, rather than on her lower pre-injury wages as a babysitter and barmaid.

In this case, the claimant did not work on offshore oil rigs for a full year prior to his injury and there is no evidence in the record showing what similarly situated offshore workers made during that period. Hence, the claimant's average weekly wage must be determined pursuant to the provisions of subsection 10(c). In this regard, the claimant apparently contends that, because he began receiving a higher hourly wage once he began working on the outer continental shelf in December of 1999, only his wages from January 1, 2000 to April 8, 2000 should be considered when calculating his average weekly wage. According to the claimant's calculations, his total cash earnings during that 98 day period were $14,163.51, i.e., an average of $1,011.68 per week. In addition to these earnings, the claimant contends, his average weekly wage should also reflect the value of the room and board that the employer provided to him at no cost whenever he was working on an outer continental shelf oil platform. The claimant contends that this room and board had a value of $25 per day and that during the period between January 1, 2000 and April 8, 2000 it had a total value of $1,325, thereby increasing his average weekly wage by $94.64 a week.

In contrast, the employer contends that the claimant's average weekly wage should be based solely on his earnings in the 52 weeks prior to his injury and that under this formula his average weekly wage is only $679.10 per week. The employer also contends that it would be improper to include the value of the claimant's room and board in the calculation of his average weekly wage.

Review of the relevant judicial precedents indicates that the claimant's average weekly wage for his April 21, 2000 injury must be based on his earnings while working on offshore oil rigs, but that it cannot be enhanced to reflect the value of the room and board provided by the employer. His average weekly wage is therefore equal to his $1,011.68 in average weekly earnings as an offshore worker. The reasons for this conclusion are as follows.

First, the evidence indicates that the claimant's wage earning capacity increased substantially once he stopped working on land-based oil rigs and began working on oil rigs on the outer continental shelf. This conclusion is demonstrated by the fact that the claimant's earnings in calendar year 1999, when he worked almost entirely on land, averaged only $630.46 per week, while his earnings in 2000, when he worked exclusively offshore, averaged $1,011.68 per week. EX 18 (showing total earnings for 1999 as $32,784.37), CX 3 (showing total earnings of $14,163.51 between January 1 and April 8, 2002). As a result, the decisions of the Ninth Circuit in *Palacios* and *Bonner* require that the claimant's average weekly wage be based on his higher average earnings as an offshore worker.

Second, although subsection 2(13) of the Act provides that non-monetary advantages that an employer provides to an employee can sometimes be included in the employee's average weekly wage, the room and board that the claimant received while working on offshore oil rigs is not in the category of fringe benefits that can be given such treatment. This conclusion follows from the fact that the claimant has failed to show that the meals and lodging were not furnished for "the

convenience of the employer." *See Wausau Insurance Companies v. Director, Office of Workers' Compensation Programs*, 114 F.3d 120 (9th Cir. 1997); *McNutt v. Benefits Review Board*, 140 F.3d 1247 (9th Cir. 1998) (holding that meals and lodging cannot be included in a claimant's average weekly wage if they are provided on the employer's business premises and "furnished for the convenience of the employer"). Indeed, the evidence in this case indicates that, because it would be extremely impractical for Pool to allow workers on offshore oil platforms to obtain their meals or lodging from any source other than the employer, the food and lodging provided to the claimant was in fact furnished for the convenience of the employer. *See also, Rowan Companies, Inc. v. United States*, 452 U.S. 247, 250-51 (1981) (government conceded that an operator of offshore oil rigs properly excluded the value of meals and lodging when computing the wages from which it withheld employees' income taxes).

2. Date of Maximum Medical Improvement for the Claimant's Physical Injuries

A disability is considered permanent on the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

In this case, the claimant says that his physical injuries reached the point of maximum medical improvement on February 23, 2001. This contention is supported by the opinion of Dr. Pojunas. In contrast, the employer contends that the claimant physical injuries became permanent and stationary on January 15, 2001. The employer's basis for this contention is the opinion of Dr. Miller.

The two suggested dates of maximum medical improvement are only five weeks apart and the evidence indicates that either of the dates would be reasonable. However, it is noted that Dr. Pojunas examined the claimant long after Dr. Miller and therefore was able to consider more medical information about the claimant's recovery from his injury. For this reason, it has been determined that the date suggested by Dr. Pojunas is the more appropriate date. Accordingly, it is concluded that the

claimant's physical injuries reached the point of maximum medical improvement on February 23, 2001.

3. Extent of Any Physical Disabilities Resulting from the Claimant's April 21, 2000 Injury

The claimant contends that, as opined by Dr. Pojunas, the claimant's April 21, 2000 work injury physically prevents him from continuing to work as a derrickman. Furthermore, the claimant alleges, the the opinion of Dr. Pojunas must be given special weight because the parties agreed when they selected him as an agreed medical examiner that his conclusions would apply in both the proceeding before that State of California's WCAB and this Longshore Act proceeding. Alternatively, the claimant contends that the opinions of Dr. Pojunas and Dr. Larsen concerning the extent of the claimant's back impairment are more convincing that the opinions of the employer's medical experts.

In contrast, the employer contends that it did not enter into any agreement to apply the opinions of Dr. Pojunas to this proceeding. Moreover, the employer contends that the reports and testimony of Dr. Farran and Dr. Miller establish that the claimant is in fact physically capable of returning to his former employment. The employer further asserts that the claimant's ability to continue working as a derrickman is supported by evidence indicating that he engaged in martial arts activities after his injury. As well, the employer suggests that these activities may have caused the claimant a second back injury after his April 21, 2000 work injury.

Review of the evidence indicates that although the claimant sought an agreement that Dr. Pojunas would serve as an agreed medical examiner for both the claimant's state workers' compensation claim and his Longshore Act claim, the counsel for the employer consistently refused to enter into such an agreement. This is shown by the deposition testimony of Judge Boyer and by the exchange of letters between the claimant's counsel and the employer's counsel in August of 2001. CX 26 at 31-32 (testimony of Judge Boyer), CX 2 at 13 (letter from the employer's counsel), CX 2 at 17 (letter from the claimant's counsel).
Accordingly, I find that the employer is not bound by the opinion of Dr. Pojunas and that his opinion is not entitled to any special weight in this proceeding.

It is therefore necessary to weigh Dr. Pojunas' opinion that the claimant is medically precluded from returning to work as a derrickman against the contrary opinions of Dr. Miller and Dr. Farran. After weighing this evidence, it is concluded that the opinion of Dr. Pojunas is more convincing.

In reaching the conclusion that the opinion of Dr. Pojunas is more convincing, consideration has been given to the fact that the weight of the evidence indicates that the claimant exaggerated the extent of his impairment when he was deposed in November of 2000 and that he almost certainly testified untruthfully when he denied participating in martial arts after his April 21, 2000 work injury. However, there is also convincing evidence that the claimant does in fact have an actual back impairment.

Most significant, in this regard, is the testimony of Dr. Pojunas that the results of the claimant's June 2000 MRI scan alone would warrant a medical preclusion against heavy lifting, repeated bending and stooping. EX 21 at 468.

In addition, the existence of an on-going back impairment is demonstrated by the fact that at least three physicians (Dr. Cho, Dr. Miller and Dr. Larsen) have found spasms in the claimant's back during physical examinations. *See* EX 9 at 114 (report of Dr. Cho indicating that he detected a back spasm when he examined the claimant on May 1, 2000), EX 12 at 149-56 (report of Dr. Miller indicating that there was a spasm from L4 to the sacrum on the left side of the claimant's lumbar spine when he examined the claimant on December 7, 2000), CX 8 at 96-106 (reports of Dr. Larsen indicating that when he examined the claimant on December 11, 2000, he found a spasm in the claimant's back), CX 8 at 112-18 (report of Dr. Larsen indicating that he found a spasm in the claimant's back during an examination on July 19, 2001), CX 8 at 122-26 (report of Dr. Larsen noting that he detected a mild spasm in the claimant's back on January 14, 2002), CX 12 at 206-09 (report of Dr. Larsen indicating that he found a spasm in the claimant's back on August 8, 2002). In this regard, it is recognized that during the trial Dr. Miller testified that he did not in fact find a spasm when he examined the claimant. However, this testimony is not convincing because Dr. Miller's written report indicates that there was in fact a spasm and because Dr. Larsen found a spasm when he examined the claimant only four days after Dr. Miller's examination. It should also be noted that although Dr. Farran did not report that he found a spasm when he examined the claimant on March 29, 2001, he did indicate that the claimant's back muscles were "palpably tight." As both Dr. Pojunas and Dr. Miller credibly testified, a muscle spasm is objective evidence of an impairment, and as Dr. Pojunas pointed out, cannot be feigned. EX 21 at 430 (testimony of Dr. Pojunas), Tr. at 535-36 (testimony of Dr. Miller).

Consideration has also been given to the fact that the claimant's back impairment might be attributable to a second injury suffered while the claimant was engaged in martial arts. The possibility that such a second injury occurred is supported by the fact that Dr. Tivnon's report of his June 27, 2000 examination of the claimant indicated that the claimant was more impaired than suggested by Dr. Cho's report of June 15, 2000. However, there is no other medical evidence suggesting that the claimant might have been injured while engaging in martial arts. Moreover, the evidence that the claimant engaged in martial arts after his work injury does not indicate that these activities occurred in June of 2000. Rather, Mr. Garrett's testimony indicates that the claimant's martial arts activities occurred between July and October. Tr. at 403.

Finally, consideration has been given to the possibility that the claimant's post-injury martial arts activities indicate that he is capable of returning to work as a derrickman. This contention is, in fact, supported by Dr. Miller, who testified that he would have found the claimant fully able to return to his usual and customary duties if he had known that the claimant had engaged in martial arts after his work injury. However, the evidence that the claimant engaged in martial arts after his work injury indicates that he was in pain when he engaged in such activities and that he ceased these activities around October of 2000. Moreover, this evidence is outweighed by the objective evidence corroborating the claimants' complaints of a back impairment, i.e., the results of the June 2000 MRI

scan and the numerous medical reports documenting the presence of muscle spasms in the claimant's back long after he ceased engaging in martial arts.

4. Timeliness of the Notice of the Alleged Psychiatric Injuries under Section 12 of the Act

Subsection 12(a) of the Act provides, *inter alia*, that a claimant must give an employer notice of a compensable work-related injury within 30 days of the injury or within 30 days after the employee is aware of a relationship between the injury and the employment, unless the claimant's injury is an "occupational disease which does not immediately result in disability or death," in which case notice must be given within one year after the claimant becomes aware of the relationship between the employment, the disease, and the death or disability.

In this case, the employer contends that any claim for alleged psychiatric injuries is barred because the claimant failed to provide notice of such injury within the time allowed under subsection 12(a). The claimant contends that his notice of his claimed psychiatric injury was timely under section 12.

Under the decision of the Benefits Review Board in *Thompson v. Lockheed Shipbuilding and Construction Co.*, 21 BRBS 94 (1988), when an impairment attributed to a work-related injury causes a second impairment, an injured worker is not required to provide additional section 12 notice for the second impairment if the worker provided timely notice for the initial injury. In this case, the employer has conceded that it had timely notice of the claimant's initial injury. Accordingly, I find that there is no section 12 bar to the claim for a psychiatric impairment.

5. Timeliness of the Claim for Psychiatric Injuries under Section 13 of the Act

Under the provisions of subsection 13(a) of the Longshore Act, a claim for a work-related injury or death is barred unless the claim is filed within one year after the injury or death. However, this subsection also provides that the time for filing a claim shall not begin to run until the injured worker is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the worker's employment. In addition, the Ninth Circuit has concluded that the section 13 limitations period does not begin to run until the employee becomes aware "that his injury has resulted in the impairment of his earning power." *Abel v. Director, OWCP*, 932 F.2d 819, 821 (9th Cir. 1991). Moreover, the Ninth Circuit has also held that an employee is not injured for purposes of applying the statute of limitations until the employee becomes "aware of the full character, extent and impact of the harm done to him." *J. M. Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180, 183 (9th Cir. 1990). In *Abel* the Ninth Circuit also noted that under its decision in *Martinac*, the claimant must have reasonably been aware that his work-impairing disability is permanent. 932 F.2d at 822. *See also Todd Shipyards v. Allan*, 666 F.2d 399 (9th Cir. 1982). Other courts of appeals have adopted the same or similar rules. *See Newport News Shipbuilding & Dry Dock Co. v. Parker*, 935 F.2d 20 (4th Cir. 1991); *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 296-97 (11th Cir. 1990);*Bechtel Associates, P.C. v. Sweeney* , 834 F.2d 1029, 1033-34 (D.C. Cir. 1987); *Marathon Oil Company v. Lunsford*, 733 F.2d 1139 (5th Cir.

1984); *Cooper Stevedoring, Inc. v. Washington,* 556 F.2d 268, 274 (5th Cir. 1977); *Stancl v. Massey,* 436 F.2d 274 (D.C. Cir. 1970).

In this case, the employer contends that any claim for alleged psychiatric injuries is barred because the claimant failed to file a claim for such an injury within the time allowed under section 13. The claimant contends that his notice of his claimed psychiatric injury was timely under section 13.

For two reasons, I find that the claim for alleged psychiatric injuries is not barred under the provisions of section 13.

First, the employer has failed to make any convincing showing that the claimant had an awareness of the full character, extent and impact of the his alleged psychiatric injury more than a year before he amended his claim to allege a psychiatric injury in September of 2002. Indeed, it was not until the claimant was seen by Dr. Larsen on August 8, 2002 that any physician indicated that the claimant might have a psychiatric impairment.

Second, under the decision of the Benefits Review Board in *Mikell v. Savannah Shipyard Co.*, 24 BRBS 100 (1990), if an initial claim is timely, an amendment to the claim adding a new basis for entitlement to benefits will not be barred under section 13. In this case, the employer has conceded that the initial claim was timely. Hence, the claimant's addition of an allegation of psychiatric injuries to his previously filed claim is permissible. *See also, U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 613 (1982) (noting that considerable liberality is shown in allowing amendments to workers' compensation claims unless there is undue surprise or prejudice to an opposing party).

6. Whether the Claimant Suffered Any Psychiatric Injury as a Result of his April 21, 2000 Injury

The claimant contends that his April 21, 2000 work injury caused him to develop a psychiatric disability or at least worsened a pre-existing psychiatric disability. In contrast, the employer contends that the work injury did not cause or worsen any psychiatric condition.

Insofar as the claimant contends that he suffered work-related psychiatric injuries, he is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order to use this presumption to show a causal relationship between a claimant's job and his or her impairment, a claimant must produce evidence indicating that he or she suffered some harm or pain *and* that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, only "*some* evidence tending to establish" both prerequisites is required and it is not necessary to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921

F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed relationship between the claimant's impairment and its alleged cause.[2] If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant.

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2. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). There is one court of appeals decision that appears to hold that medical testimony offered to rebut a subsection 20(a) presumption of causation is not sufficient to satisfy the requirements of the Act unless that testimony completely "rules out" any possible causal connection between a claimant's employment and the alleged disability. *See Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297 (11th Cir. 1990) (holding that the subsection 20(a) presumption was not rebutted because no physician had offered an opinion "ruling out a potential connection" between the claimant's medical condition and his employment). However, this standard has been applied only in the Eleventh Circuit and it has been explicitly rejected by both the First and Fifth Circuits. *Bath Iron Works v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997)(holding that an "employer need not rule out any possible causal relationship between the claimant's employment and his condition" because such a requirement "would go far beyond the substantial evidence standard set forth in the statute"); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)("unequivocally" rejecting a "'ruling out' standard" and noting that the text of subsection 20(a) requires only "substantial evidence" to rebut the presumption). Moreover, the Fourth and Seventh Circuits have implicitly rejected a "ruling out" standard by issuing decisions holding that all it takes to rebut a subsection 20(a) presumption is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 817-18 (7th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 263 (4th Cir. 1997).

In this case, the claimant's alleged work injuries occurred in the Ninth Circuit, which has not yet considered the argument that subsection 20(a) requires an employer to provide evidence completely ruling out even a hypothetical possibility of a causal relationship. However, the Ninth Circuit's most recent decision concerning the application of subsection 20(a) suggests that if the issue were to be presented, this circuit would join with the First, Fourth, Fifth and Seventh Circuits in rejecting any such standard. In that decision, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999), the court did not in any way suggest that medical evidence that fails to completely "rule out" even the possibility of causation is in any way insufficient or equivocal. Rather, the court expressed agreement with the Benefits Review Board's observation that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. Moreover, the BRB has recently held that medical opinions that are within a "reasonable degree of medical certainty" cannot be rejected as being "equivocal" just because such opinions do not "rule out" even the hypothetical possibility of a causal relationship. *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-43 (2000).

See also, Holmes v. Universal Maritime Services Corp., 29 BRBS 18, 21 (1995). If the presumption is not rebutted with substantial evidence, a causal relationship between the worker's job and his or her impairment must be presumed. However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit, clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

It is also noted that under the so-called "aggravation rule," a claimant seeking benefits under the Longshore Act does not have to show that a work injury was the sole cause or even the principal cause of a disability. Rather, a claimant need only show that an employment-related injury aggravated, accelerated, or combined with a pre-existing impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If a claimant is successful in making such a showing, his or her entire impairment is compensable. *Id.*

To support his contention that his April 21, 2000 injury caused or worsened a psychiatric disability, the claimant apparently relies on his own testimony, the testimony of Ms. Bilyeu, the testimony and reports of Dr. Enelow, and the reports of Dr. Murphy. The foregoing evidence is clearly sufficient to warrant invocation of the subsection 20(a) presumption.

The employer's contention that the claimant's work related injury did not cause or worsen any psychiatric disability is primarily supported by the testimony and reports of Dr. Franklin. This evidence is sufficient to rebut the subsection 20(a) presumption.

Accordingly, it is necessary to consider all of the relevant evidence to determine if there is a causal relationship between the claimant's depression and his work injury. After so considering the evidence, I find that the weight of the evidence favors the conclusion that the claimant's work injury did in fact cause the claimant to become depressed or worsen a pre-existing depression. There are two reasons for this conclusion.

First, the weight of the evidence clearly indicates that the claimant is now suffering from major depression. This is established by the testimony and reports of Dr. Enelow and Dr. Murphy, as well

as by the trial testimony of Ms. Bilyeu, who corroborated the claimant's account of his intentional drug overdose.

Second, the weight of the evidence shows that the claimant's physical inability to return to work as a derrickman has contributed to the depression. For example, both Dr. Enelow and Dr. Murphy have attributed the claimant's depression to his inability to perform his former job and even Dr. Franklin has conceded that the claimant's work-related injury might have aggravated a pre-existing condition. Further support for this conclusion is found in the testimony of Ms. Bilyeu, who testified that when the claimant would weep, he would sometimes refer to his job, and by the testimony of the claimant's wife, who testified that he "seemed to be more depressed" after a physician told him he could no longer work in the oil fields. The claimant's wife also testified that after the work injury the claimant went from being happy to being sad and depressed. CX 15 at 252-53.

7. The Date of Maximum Medical Improvement for the Claimant's Alleged Psychiatric Injuries

The claimant apparently contends that his depression has not yet reached the point of maximum medical improvement. This position is supported by the testimony of Dr. Enelow and the reports of Dr. Murphy. In contrast, the employer contends that the claimant's depression became permanent and stationary on the day he was examined by Dr. Franklin, which was January 8, 2003.

I find that the claimant's depression has not yet reached the point of maximum medical improvement. In this regard, it is noted that despite the fact that both Dr. Enelow and Dr. Murphy have recommended that the claimant be treated with antidepressant medications, such medications have still not been provided to him. See CX 21 (report of Dr. Murphy indicating that treatment with antidepressant medications "will make a significant difference in the patient's level of depression"). Moreover, even Dr. Franklin acknowledged that psychiatric treatment "might be helpful" to the claimant.

8. Extent of Any Psychiatric Disabilities Resulting from the April 21, 2000 Injury

The employer apparently contends that even if the claimant's injury of April 21, 2000 did cause him to become depressed, the depression was later substantially worsened by intervening causes that were unrelated to the claimant's work injury. In particular, the employer seems to be contending that the claimant's depression was worsened by the break-up of his marriage and by his apprehension that he could be prosecuted for perjury for falsely claiming that he had not engaged in martial arts after his work injury. In contrast, the claimant contends that his depression is almost entirely attributable to his work-related injury and, alternatively, that his break up with his wife was indirectly caused by the work injury.

It is clear under the provisions of subsection 2(2) of the Act that if a claimant suffers an injury at work that is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and related medical expenses if the subsequent injury or aggravation "naturally or unavoidably results" from the original work injury. *See also, Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Lewis v. Norfolk Shipbuilding and Dry Dock Co.*, 20 BRBS 127 (1987); *Pakech v. Atlantic & Gulf Stevedores, Inc.*, 12 BRBS 47 (1980). However, if the subsequent progression of the condition is not a natural or unavoidable result of the work injury, but is the result of an intervening cause, the employer can be relieved of liability for any disability attributable to the intervening cause. *Cyr v. Crescent Wharf & Warehouse* Co., 211 F.2d 454 (9th Cir. 1954); *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Jones v. Director, Office of Workers' Compensation* Programs, 977 F.2d 1106 (7th Cir. 1992); *Marsala v. Triple A South*, 14 BRBS 39 (1981).

The court of appeals decisions in *Cyr*, *Bludworth*, and *Jones* set forth somewhat different tests for determining if an injury or impairment is the natural or unavoidable result of a prior work injury. However, this case arises in the Ninth Circuit and is therefore governed only by the standard set forth in the Ninth Circuit's *Cyr* decision. In that decision, the Ninth Circuit held that if an employee who has sustained a primary work related injury:

> sustains an additional injury off the job which is not the natural or unavoidable result of the primary one and is adduced by the employee's own intention or carelessness, he can have no compensation for the added injury because the added injury would not have arisen from the hazards of employment.

In the *Marsala* decision, *supra*, the Benefits Review Board interpreted the *Cyr* decision as supporting a conclusion that an employer is also relieved of liability under the Act for aggravations of prior injuries when the aggravation is the result of the "intentional or negligent conduct of a third party." 14 BRBS at 43.

Relevant case law indicates that the subsection 20(a) presumption of causation can be invoked by a claimant who seeks to show that a particular condition was the natural or unavoidable result of a prior work-related injury. *Thompson v. Lockheed Shipbuilding and Construction Company*, 21 BRBS 94, 96 (1988); *Turner v. C & P Telephone Company*, 16 BRBS 255, 256-57 (1984). In this regard, the claimant primarily relies on the reports of Dr. Murphy and the reports and testimony of Dr. Enelow. As previously noted, both Dr. Murphy and Dr. Enelow have opined that the claimant's work injury caused "major depression" and attributed the claimant's depression almost entirely to his work related injury. In addition, the claimant has, in effect, asserted that his post-injury decline in income caused the break-up of his marriage and that therefore any worsening of his depression after his wife left him was an indirect result of his work injury. This evidence is sufficient to invoke the subsection 20(a) presumption that any worsening of the claimant's post-injury depression was not due to intervening causes. In turn, the employer has rebutted this evidence by submitting the testimony and report of Dr. Franklin. As already explained, Dr. Franklin has opined that the claimant's depression is not the result of his work injury, but is instead primarily the result of the break-up of the claimant's marriage. Accordingly, it is necessary to weigh all the evidence to

determine if a preponderance of the evidence supports the claimant's contention that intervening causes did not worsen his post-injury depression.

For the following three reasons, I find that intervening causes unrelated to the claimant's work injury substantially worsened his depression and that in the absence of these causes, the claimant's work-related depression would not have precluded him from finding and performing alternative employment.

First, although there is evidence indicating that the claimant was in fact mildly depressed after being told that he would not be able to return to work as a derrickman, there is strong evidence that the claimant's depression became progressively more severe following each of two separate events that occurred in 2001 and 2002. The first of these two events was the break-up of the claimant's marriage to Sarah Vantassel in January of 2001. According to the testimony of both Mr. Garrett and Ms. Bilyeu, after this event, the claimant was so distraught that there were times when he would cry about his separation from his children and estranged wife. Tr. at 437 (testimony of Mr. Garrett), Tr. at 381-82 (testimony of Ms. Bilyeu). The second event was Mr. Garrett's testimony at the July 3, 2002 WCAB hearing directly contradicting the claimant's prior deposition testimony that he had not engaged in martial arts activities after his April 21, 2000 work injury. Only a few days after this event, the claimant disappeared with his girl friend's car for two days and shortly thereafter he took an overdose of drugs. CX 12 at 206-09 (report of Dr. Larsen), Tr. at 374-78, 383-84 (testimony of Ms. Bilyeu). During the following week the claimant gave such erratic testimony in his Longshore Act trial that his counsel asked that the trial be recessed until the claimant was competent to testify. Tr. at 374-78 (testimony of Ms. Bilyeu), Tr. at 222-28 (request for a recess). In contrast, during the nine months between the claimant's April 2000 work injury and the January 2001 break up of his marriage, there is very little to suggest that the claimant's depression was anywhere near as disabling as it became after the break up of the claimant's marriage or the testimony of Mr. Garrett. In fact, during the period before January of 2001 the claimant appeared for numerous medical appointment and two pre-trial depositions. Nothing in the reports of these medical examinations or the transcripts of the two depositions in any way suggests that the claimant was then significantly disabled by depression.[3] In addition, the testimony of Mr. Garrett indicates that during some of this period the claimant was still engaging in martial arts activities and was telling people that he intended to open a martial arts studio with the $1 million to $1.5 million he expected to receive from his workers' compensation claim. Moreover, the fact that the claimant's counsel did not make any effort until July

3. In this regard it is noted that the claimant told Dr. Enelow that he had lost 20 pounds shortly after his work injury. CX 22 at 390. However, the claimant's time estimates in this proceeding have frequently been highly inaccurate and Dr. Enelow admits that there is no substantiation for this assertion. CX 22 at 390. Moreover, the only weight loss substantiated by the medical records occurred some time between December of 2000, when the claimant weighed 195 pounds, and September of 2001, when he weighed 180 pounds. EX 12 at 151 (report of Dr. Miller), EX 14 at 178 (report of Dr. Pojunas). By the time the claimant was examined by Dr. Enelow, he again weighed 195 pounds. CX 22 at 387.

of 2002 to amend the claim to include psychiatric injuries further suggests that the claimant's depression did not become disabling until well after January of 2001.

Second, there is strong evidence that the severe aggravation of the claimant's depression in July of 2002 was attributable to the claimant's fear that his own intentional misconduct in falsely testifying in two pre-trial depositions about his post-injury martial arts activities would cause him to be prosecuted for perjury or lose his workers' compensation cases. The conclusion that the claimant testified falsely in the pre-trial depositions is supported by the testimony of Mr. Garrett, who was an exceptionally credible witness, and by the fact that the claimant's trial testimony concerning his post-injury activities was contradictory, confusing, and generally not credible. The inference that this intentional misconduct caused the claimant to fear that he might lose his workers' compensation cases or even be prosecuted for perjury is supported by the fact that the claimant's disappearance with his girl friend's car and subsequent drug overdose occurred almost immediately after Mr. Garrett's WCAB testimony. This inference is also supported by Dr. Murphy's report of November 18, 2002, which indicates that the claimant told Dr. Murphy that unnamed insurance companies were trying to "get him for perjury." CX 14 at 222-27.

Third, the preponderance of the evidence indicates that the worsening of the claimant's depression after the break up of his marriage in January of 2001 was not the natural or unavoidable result of the claimant's work injury and that it is more likely than not that the marriage would have broken up even if the claimant had not been depressed by his work injury. In this regard, it is recognized that the claimant has asserted that his wife left him because of the loss of income associated with his work injury. However, the weight of the evidence does not support this assertion. Although the claimant's wife has acknowledged that the claimant's post-injury emotional instability contributed to their separation, she also attributed the break up to the fact that the claimant had changed his friends and "was not coming home." CX 15 at 244, 253-54, 267-68. Significantly, her testimony suggests that these latter two behaviors had alone been sufficient to cause her first divorce from the claimant. CX 15 at 239-40, 267-68. In addition, the wife's testimony implies that the claimant's use of illegal drugs also contributed to her decision to leave the claimant for a second time. CX 15 at 268-69 (testimony of the claimant's wife that she had good reason to believe that the claimant was smoking marijuana). Ms. Vantassel's testimony about these concerns is partially corroborated by the claimant's own November 2000 deposition testimony that his wife had threatened to leave him if he didn't stop drinking and by his trial testimony that his wife had said she left him because he was "doing drugs." EX 16 at 259 (deposition testimony), Tr. at 270, 272, 296-97 (trial testimony).

9. Extent of the Claimant's Entitlement to Disability Benefits

In cases involving disputes over an injured worker's entitlement to disability benefits, the burden is initially on the claimant to show that he or she cannot return to his or her regular employment due to a work-related injury. *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, he or she is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternative employment for the claimant in the geographical area where the claimant resides or was injured. *Bumble Bee Seafoods*

v. Director, OWCP, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing the availability of suitable alternative employment, the employer must point to specific jobs that the claimant can perform. *Bumble Bee, supra*, at 1330. In considering whether a claimant has the ability to perform particular work, the fact finder must also consider the claimant's technical and verbal skills, as well as the likelihood that a person of the claimant's age, education, and background would be hired if he or she diligently sought the possible job identified by the employer. *Hairston, supra*, at 1196; *Stevens v. Director, OWCP*, 909 F.2d 1256 at 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he or she diligently tried to obtain such work, but was unsuccessful. *Edwards v. Director, OWCP*, 999 F.2d 1374, 1376 n.2 (9th Cir. 1993); *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991).

In this case, the claimant contends that he has been totally disabled continuously from the time of his April 21, 2000 work injury. The employer, on the other hand, contends that the claimant is capable of returning to work as a derrickman. Alternatively, the employer contends that alternative work has been available to the claimant. The employer's support for this alternative contention is the December 6, 2001 job market survey by vocational consultant Paul Johnson. EX 15 at 188-200.

As previously explained, the weight of the medical evidence indicates that the claimant cannot return to work as a derrickman. As a result, it is necessary to consider whether Mr. Johnson's job market survey does in fact show that suitable alternative employment is available to the claimant. According to Mr. Johnson's survey and report, in the year 2001 there were 13 specific job opening for jobs in California's Kern and Ventura counties that were within the restrictions prescribed by Dr. Pojunas and suitable for a person with the claimant's vocational background. The two jobs that paid the most ($16.56 per hour) were flow meter repair technician jobs that were available in the city of Bakersfield on August 1, 2001 and October 15, 2001. I find that the evidence of these two jobs is sufficient to meet the employer's burden of showing suitable alternative employment and further conclude that as of August 1, 2001, the claimant had a residual wage earning capacity of $662.40 per week (i.e., $16.56 times 40).

In determining when suitable alternative employment became available to the claimant, consideration was given to the assertion by Dr. Enelow that the claimant has been totally temporarily disabled by depression since he first realized that he could not return to work as a derrickman. However, that opinion is less convincing than Dr. Franklin's conclusion that the claimant is even now psychiatrically able to perform his former job as a derrickman and other types of employment. In this regard, it is noted that Dr. Enelow relied almost entirely on the claimant for his information and has no direct knowledge of the claimant's psychiatric condition at times prior to his examination of the claimant in December of 2002. Indeed, Dr. Enelow admitted that he could not say what the claimant's condition was "on and off" from the date of the work injury. CX 22 at 371-72.

Because the $662.40 per week that the claimant could earn as a flow meter repair technician is less than his pre-injury average weekly wage of $1011.68, under the provisions of section 8(c)(21) of the Longshore Act he is entitled to an award of permanent partial disability benefits equal to two-

thirds of the difference between his average weekly wage before his injury and his earning capacity following the injury. However, before making such a calculation, the claimant's post-injury earning capacity has be adjusted to account for wage inflation between the date of his work injury and the date that suitable alternative employment became available. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, no such evidence is contained in this record. Accordingly, the necessary adjustment must be made by decreasing the claimant's current residual wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage (NAWW) since the date of the claimant's work injury. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Data published by the Department of Labor show that the NAWW increased from $450.64 on October 1, 1999, to $466.91 on October 1, 2000. Therefore, when adjusted to reflect the changes in the NAWW, the claimant's August 2001 residual wage earning capacity of $662.40 was equivalent to a weekly wage of $639.32 in April of 2000. The claimant's loss of wage earning capacity is thus $372.36 per week (his average weekly wage of $1,011.68 minus $639.32). Therefore, I find, on August 1, 2001 the claimant's entitlement to total disability benefits ended and he instead became entitled to permanent partial disability benefits of $248.24 per week (i.e., two thirds of his lost wage-earning capacity of $372.36).

10. Whether the Employer Terminated the Claimant's Employment in Violation of Section 48a of the Act

Section 48a of the Act provides that it is unlawful for an employer to "discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer." 33 U.S.C. §948a. In order to establish a *prima facie* case of a section 48a violation, a claimant must show that the employer committed a discriminatory act motivated by a discriminatory animus or intent. *See Brooks v. Newport News Shipbuilding and Dry Dock Company*, 26 BRBS 1, 3 (1992). A "discriminatory act" has been defined as the "different treatment of like groups or individuals." *Holliman v. Newport News Shipbuilding & Dry Dock*, 852 F.2d 759, 761 (4th Cir. 1988). An administrative law judge may infer animus from circumstances demonstrated by the record. *Id.* Thus, the circumstances of a claimant's discharge may be examined to determine whether an employer's reasons for firing an employee are credible or a mere pretext for a termination that was actually motivated at least in part by the filing of a compensation claim. *Id.* Moreover, in cases in which the evidence shows that an employer had a general animus against a claimant, such as an animus that may have stemmed from causes other than the claimant's application for workers' compensation benefits, the burden is shifted to the employer to prove that it was not motivated, even in part, by the claimant's exercise of his rights under the Act. *Geddes v. Benefits Review Board*, 735 F.2d 1412, 1417-18 (D.C. Cir. 1984).

In this case, the claimant contends that his termination from Pool's employment in November of 2000 violated section 48a because it was in retaliation for having made a claim for benefits under the Longshore Act. The employer contends that the termination was not retaliatory and that it was

solely the result of a company policy that required the termination of any employee who was absent from work for more than 90 days.

Review of the evidence indicates that Pool did in fact have a policy of terminating any employee who had been absent from work for more than 90 days and this policy was consistently applied to all employees regardless of the reason for their work absences. EX 26 at 32-33 (deposition testimony of Dennis Boswell). Accordingly, I find that the claimant has failed to meet his burden that he has been treated in a discriminatory manner and that he has therefore failed to show that the employer violated section 48a of the Act. *See Holliman v. Newport News Shipbuilding & Dry Dock, supra*.

11. The Employer's Entitlement to a Credit under Subsection 3(e) of the Longshore Act for Vocational Rehabilitation Maintenance Allowance Payments It Made to the Claimant under the State of California's Workers' Compensation System

Subsection 3(e) of the Longshore Act provides that "any amounts paid to an employee for the same injury, disability or death for which benefits are claimed under [the Longshore Act] pursuant to any other workers' compensation law ... shall be credited against any liability imposed by the Act." Thus, it is clear that the employer in this case is entitled to credit for any benefit payments made to the claimant under the State of California's workers' compensation laws.

In this case, exhibits submitted by the employer indicate that between April 26, 2001 and January 2, 2002, the employer paid the claimant a total of $7,855.20 in Vocational Rehabilitation Maintenance Allowance payments. EX 4 at 8. Such payments were apparently made pursuant to section 139.5 of the California Labor Code, which concerns the vocational rehabilitation of injured workers. Accordingly, I find that the employer is entitled to a subsection 3(e) credit for such payments.

12. The Employer's Entitlement to a Credit under Subsection 3(e) of the Longshore Act for an Amount Paid to Reimburse the State of California for State Disability Insurance Payments

The employer contends that it is also entitled to a credit for a $7,076.40 payment it made to discharge a lien that the State of California's Employment Development Department (EDD) had filed in connection with the claimant's state workers' compensation claim. The EDD lien sought reimbursement for State Disability Insurance (SDI) payments that the EDD had paid to the claimant pursuant to a disability insurance program established by California's Unemployment Insurance Code. *See* Tr. at 79-83.

The claimant opposes the employer's request for this credit.

Review of the section 2629 of the California Unemployment Insurance Code indicates that disabled individuals are not eligible for SDI benefits during any period in which they receive or are "entitled to receive" benefits under any state or Federal workers' compensation law. Moreover, when an injured worker has been paid SDI benefits for a disability arising out of a compensable work-

related injury, California's workers' compensation statute authorizes the EDD to recover the overpayment by filing a lien against the worker's state workers' compensation benefits. *See* California Labor Code sections 4903 and 4904. Hence, when the employer in this case discharged EDD's lien against the claimant's workers' compensation benefits, it was in effect indirectly making a payment to the claimant pursuant to the workers' compensation laws of the State of California. In addition, if the employer is not allowed a credit for its $7,076.40 payment to the EDD, the claimant will have been compensated twice for the same injury, even though such a double recovery would be inconsistent with both the Longshore Act and California's Labor and Unemployment Insurance codes. For these reasons, therefore, I find that the employer should be granted a subsection 3(e) credit for the payment to EDD.[4]

13. The Employer's Liability for the Claimant's Self-Procured Medical Care

The claimant has submitted documents showing that Dr. Murphy has filed a medical care provider's lien for $746.50 with the State of California's Workers' Compensation Appeals Board for treatment she provided to the claimant between August 9, 2002 and December 6, 2002. *See* CX 17 at 318-20. Because the claimant has not submitted any evidence showing that he has in fact paid any of Dr. Murphy's bills, it appears that he is seeking an order requiring the employer to pay Dr. Murphy directly. The employer contends that it has no liability to pay for medical care the claimant received from Dr. Murphy because, it alleges, the claimant did not seek the employer's advance authorization to receive such treatment, as required by subsection 7(d) of the Act.

Under section 7 of the Act, an employer is required to furnish an injured employee such medical treatment as the nature of the injury may require. 33 U.S.C. §907(a). A claimant establishes a *prima facie* case that his or her medical care is compensable if the evidence shows that a licensed physician has indicated that the treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Telephone Company*, 16 BRBS 255 (1984). If an employee's request for necessary treatment is denied or neglected by an employer, the employee is entitled to procure the necessary treatment at the employer's expense. 33 U.S.C. §933(d); *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1986). However, a claimant cannot recover the cost of medical treatment unless the claimant himself or herself paid the bills. *Nooner v. National Steel and Shipbuilding Co.*, 19 BRBS 43, 46 (1986).

Because the claimant has not provided any proof that he has in fact paid Dr. Murphy's bills, he is not entitled to recover the amount of those bills in this proceeding. Dr. Murphy, however, can

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4. In this regard, it is noted that in *Lustig v. United States Department of Labor*, 881 F.2d 593 (9th Cir. 1989), the Ninth Circuit refused to allow an employer to take a subsection 3(e) credit for an amount it expended to pay a physician's lien. However, the court's decision indicates that it reached this conclusion only because there was uncertainty about the scope of a contemporaneous settlement agreement and that the court would have allowed a credit if there was clear evidence that a double recovery would have otherwise occurred.

bring a separate claim seeking payment for her services and can recover the costs of any attorney's fees associated with her claim. *See Hunt v. Director, OWCP*, 999 F.2d 419 (9th Cir. 1993). Because she did not treat the claimant until after the employer's August 2, 2002 Notice of Controversion of any claim for psyche injuries, her claim cannot be denied on the grounds that the claimant failed to seek the employer's advance authorization to receive treatment from her.

ORDER

1. The employer shall pay the claimant temporary total disability benefits for the period between April 21, 2000 and February 22, 2001 at a compensation rate of $674.45 per week

2. The employer shall pay the claimant permanent total disability benefits for the period between February 23, 2001 and July 31, 2001 at a compensation rate of $674.45 per week.

3. Beginning on August 1, 2001 and until ordered otherwise, the employer shall pay the claimant permanent partial disability benefits at a rate of $248.24 per week.

4. The claimant's request for remedies for the alleged violation of 33 U.S.C. §948a is denied.

5. The employer shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at the rates determined by the District Director.

6. The employer shall receive credit for all compensation paid to the claimant since April 21, 2000, including $7,855.20 paid to the claimant as a vocation rehabilitation maintenance allowance pursuant to the workers' compensation laws of the State of California.

7. The employer shall also receive a credit for $7,076.40 which it repaid to the State of California's Employment Development Department for State Disability Insurance payments made by the State of California.

8. The District Director shall make all calculations necessary to carry out this order.

9. The employer shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the sequelae of his April 21, 2000 injury, including his back injury and depression.

10. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and is directed to serve such petition on the undersigned and on the counsel for the employer within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, counsel for the employer shall initiate a verbal discussion with counsel for the claimant in an effort to amicably resolve any dispute concerning the

amounts requested. If the two counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, counsel for the claimant shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the counsel for the employer with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the employer and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for employer shall file a Statement of Final Objections and serve a copy on counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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Paul A. Mapes
Administrative Law Judge